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No. 90-1947

IN THE
Supreme Court of the United States
OCTOBER TERM, 1991

JOHN K. YEE and IRENE S. YEE, *et al.*,
Petitioners,

v.

CITY OF ESCONDIDO,
Respondent.

On Writ of Certiorari to the Fourth Appellate District, Division One, Court of Appeal for the State of California

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BRIEF OF THE AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENT

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BRIEF OF THE AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENT

This brief *amicus curiae* of the American Federation of Labor and Congress of Industrial Organizations ("AFL-CIO") is filed with the consent of the parties and in support of the respondent, as provided for in the Rules of this Court.

INTEREST OF THE *AMICUS CURIAE*

The AFL-CIO is a federation of 89 national and international unions with a total membership of approximately 14,000,000 working men and women. The AFL-CIO, its affiliates, and their members have a strong interest in the constitutional standards applicable to local, state, and federal government regulation of housing in order to protect tenants, as a particular matter, and government economic regulation, as a general matter.

INTRODUCTION AND SUMMARY OF ARGUMENT

Petitioners' brief discusses interchangeably the effects of two distinct pieces of legislation: the City of Escondido's Mobilehome Rent Protection Ordinance, Escondido Municipal Code, § 29-101, *et seq.*, and the State of California's Mobilehome Residency Law, Cal. Civil Code § 798, *et seq.* But the State is not a party to this action; the only defendant here is the City of Escondido; and there is no challenge to the state statute stated in the complaint. Joint Appendix ("J.A.") 2-18. In these circumstances, the only issues before the Court concern the constitutionality of the challenged provisions of the city ordinance. The constitutionality of the state statute is not before the Court in this case.

As a challenge only to the city rent control ordinance, this case is plainly within the run of rent and price control cases, and a decision for the respondent is dictated by this Court's precedents. *See* pp. 20-23, *infra*. In this

amicus curiae brief, rather than simply rest on this sufficient ground, we meet petitioners on their own terms and show that, taken together or separately, neither the city nor the state enactment constitutes a physical or a regulatory taking under the Takings Clause.[1]

To the contrary, these enactments combine to comprise a reasonable and balanced regulatory scheme designed to protect and preserve the legitimate interests of two distinct groups of property owners, in circumstances where the two groups' ownership interests are interdependent. Specifically, these regulations address a unique form of residential housing—the "mobilehome" or "prefabricated home"—in which ownership of a single family home is separate from ownership of the land on which the home sits, and the home, once placed on the land, cannot be removed except at great cost to the homeowner.

Because of these separate ownership interests, the regulations go beyond the problem of excessive rents arising from housing scarcity, which is the common predicate for rent control legislation. The additional problem of particular concern is the homeowner's dependency—his vulnerability to exploitation by the landowner—once the homeowner affixes his home to the landowner's land. The state statute and the city ordinance are designed to protect the homeowner from excessive increases in rent for the land *and* from the destruction or diminution of the value of his investment in his home that results from the landowner's exploitation of that vulnerability. At the same time, both enactments are careful to preserve the landowner's ability to make a fair and reasonable return on his investments in the land and its development. And both enactments apply to any particular landowner only

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[1] We do not address in this *amicus curiae* brief the various threshold arguments made by respondent—that petitioners' taking claims are premature, and that petitioners' regulatory taking claim, which was neither litigated below nor raised in their petition for certiorari, is not properly before the Court. We will also not separately address petitioners' claim that the regulations here violate the substantive requirements of the Due Process Clause.

so long as he chooses to remain in the business of leasing his land for occupation by mobilehome owners.

The state and city enactments are well within the range of legitimate regulatory responses to the problems posed by the combination of ownership interests of mobilehome owners and landowners. All that these regulations may "take" from the landowner is his ability to charge excessive rents—excessive in the sense that the charge includes amounts derived from the landowner's exploitation of both the scarcity of the resource being leased (mobilehome park space) and the dependent position of a homeowner who must affix the product of his investments (his mobilehome and all improvements to that home) to the landowner's land. All that the State and the City "give" to the homeowner is the right to be free of such exploitation on an ongoing basis and the attendant ability to protect the value of *his* investments against the adverse effects of such exploitation. Neither the common law nor constitutional law has ever treated a property owner's ability to take advantage of scarcities or market leverage in order to secure a monetary premium—*viz.*, a return above a fair and reasonable return on his investment—as an inherent property right protected from the effects of government regulation.

In part I, *infra*, we show that in the absence of the city and state enactments here the landowner may extract premiums based not only on the scarcity of mobilehome sites but also on the appropriable quasi-rents that are created by the dependent nature of the homeowner's investments in his home and surroundings once the home is affixed to the landowner's site. The value of the quasi-rents that the landowner may appropriate is not the result of any additional investment by the landowner, but is a function of the investments of the homeowner and the value the homeowner stands to lose if he were compelled to take an action that would benefit neither party—removing the home from the site.

The enactments here are designed to achieve the following results: (1) to limit periodic rent increases to

amounts that provide a fair and reasonable return based on the investments of the landowner and not on his market leverage; (2) to protect against the landowner's ability to extract quasi-rents from the homeowner at the time of sale of the home by, *inter alia*, raising the rent to the purchaser and thereby depressing the sale price of the home; and (3) to give economic incentives to mobilehome owners to invest in improving their homes, their sites, and their communities, by assuring homeowners that they—and not the landowners—will receive the returns on their own investments. The benefits of the enactments thus go to all present and future mobilehome owners and to the greater community.

In part II, *infra*, we show that this Court has repeatedly held that price or rent control regulations—which deprive sellers or landowners of the ability, based on scarcity or on market leverage, to extract premiums in excess of a fair return on investment—do not constitute "takings" under the Takings Clause. This line of decisions governs this case.

As we go on to show, petitioners' efforts to avoid the force of these authorities by recasting the case do not bear analysis. First, we show that all provisions that are even arguably relevant to a physical taking claim are found in the state statute, which is not challenged in this case and thus is not properly before the Court. Second, we show that those state statutory provisions, even if they were properly before the Court, would not effect a "taking." Petitioners' land is occupied by mobilehomes not because of state compulsion, but because of petitioners' commercial choices. Provisions limiting petitioners' control over the identity of their lessees are not different from common regulatory provisions that have, quite correctly, never been considered takings. Third, none of petitioners' arguments approach the requirements this Court has stated for a regulatory taking.

ARGUMENT

I. THE EFFECTS OF THE REGULATIONS ON THE INTERESTS OF THE LANDOWNER AND THE HOMEOWNER

A. The Relationship of the Landowner and the Homeowner in the Absence of the Regulations

It facilitates analysis here to begin with a detailed consideration of the economic relationship of the mobilehome park owner and the mobilehome owner in the absence of the city and state regulations.

1. At the outset of the relationship between a mobilehome owner and a park owner, the mobilehome owner has made two significant investments: the cost of buying the home itself [2] and the cost of transporting and affixing the home to the landowner's site; [3] the landowner, in his turn, has invested in the mobilehome site, utility outlets, and sometimes such amenities as landscaping of common areas, playgrounds, swimming pools and clubhouses.[4]

Although this form of home ownership has been celebrated as "a significant source of affordable housing for American families," [5] there is a severe and well-

---

[2] The average sales price of a new mobilehome is between $19,200 and $34,800. Manufactured Housing Institute, *Quick Facts* 1990/91.

[3] The average new mobilehome sold in today's market is 1050 square feet. Drury, *Mobilehome (The Unrecognized Revolution in American Housing)* (rev. ed. 1972) at 102 (1955 and 1966 data); Nutt-Powell, *Manufactured Homes (Making Sense of a Housing Opportunity)* (1982) at 53 (1973 and 1980 data). Transportation of a dwelling of this size requires specialized trucks and loading equipment. Hirsch & Hirsch, *Legal-Economic Analysis of Rent Controls in a Mobile Home Context: Placement Values and Vacancy Decontrols*, 35 U.C.L.A. L. Rev. 399, 404 (1988). The cost of such transportation is substantial, *id.* at 404-05. *See also* Cal. Civil Code § 798.55(a) (West 1982) (citing "the high cost of moving mobilehomes").

[4] *See* Hirsch & Hirsch, *supra*, 35 U.C.L.A. L. Rev. at 405-06 & nn. 22 & 23.

[5] *The Report of the President's Commission on Housing* 85-86 (1982) (noting that prefabricated housing is a major housing source

documented shortage of available mobilehome sites, particularly in California.[6] Among the causes of this scarcity is the prevalence of zoning regulations, which limit the areas where mobilehome parks may be placed, require such parks to meet size specifications, and limit the number of sites within each park.[7] This government-exacerbated scarcity enables the landowner—in the absence of rent regulation—to extract a premium from the mobilehome owner in the rent charged for the mobilehome site.

Once an initial lease agreement is entered into, and the home is affixed to the site, the mobilehome owner must make additional site-specific investments in order to adapt the home to the site, and he typically undertakes as well the kinds of site-specific investments that homeowners generally make to turn a new house into a home. Thus, mobilehome owners often install steps, skirting, walk-

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for "first-time home buyers, the elderly, and low- and moderate-income families," and that such housing accounted for almost 36 percent of all single-family homes sold in the United States in 1981, and for the vast majority of those which sold for under $50,000).

[6] *See, e.g.*, City of Los Angeles, Community Development Department, Rent Stabilization Division, *Rental Housing Study (Mobilehome Parks Under Rent Stabilization)* 57 (1985) ("[v]acant pads were found to be virtually non-existent—only two out of 1,226 appeared in the sample"); Sanchez Talarico Associates, *Alternative Location and Replacement Housing Opportunities for Oxnard Mobile Home Lodge* (Sept. 1988) (only 12 out of roughly 11,000 spaces vacant); Baar, *Mobilehome Ownership in Fremont* 13-14 (Aug. 1991) (total absence of spaces in Alameda and Santa Clara counties).

[7] In the City of Escondido, for example, the zoning laws restrict mobilehome parks to certain areas of the City, restrict the density of homes within the parks, and place minimum size requirements on the development of new parks. *See* Escondido Municipal Code, § 33-190, *et seq.*

For more general discussions of the impact of zoning laws on mobilehome park scarcity, *see* Note, *The Community and the Park Owner Versus the Mobile Home Park Resident*, 52 B.U.L. Rev. 811 (1972); Hearings on S. 2740 Before the Subcomm. on Housing and Urban Affairs of the Senate Comm. on Banking and Currency, 91st Cong. 1st Sess. vol. 91, at 9 (1969).

ways, and driveways, and may also invest in, *e.g.*, landscaping, carports, porches, and decks.

2. When the term of the initial lease runs out, the homeowner is in a considerably weakened position with respect to the negotiation of a successor lease. Were he to be unable to obtain a successor lease, a homeowner wishing to retain his home would have to bear all of the following transaction costs of removing his home from the site:

> (a) He would lose the investments he made in adapting the home to the site and improving the site.
>
> (b) He would have to pay the considerable costs of transporting the home to a new park.
>
> (c) He would have to pay the costs of repairing the damage to the home that often occurs when a home is removed from the site to which it has been affixed. *See* Cal. Civil Code § 798.55(a).
>
> (d) He would have to bear the financial and psychological costs of searching for a new location in a scarcity market where a convenient and vacant spot might not easily be found. *See* note 6, *supra*.
>
> (e) As with anyone else having to move, he would suffer the subjective, non-economic costs of detaching himself and his family from the community in which they have been living. Having to move might mean that children have to change schools, the family has to go to a different church, and other relationships are lost or diminished.

In negotiating a successor lease, the landowner is, accordingly, in a position to extract additional rent from the homeowner up to the value of the substantial costs that would be involved in such a move. Thus, absent government regulation, the landowner can extract a substantial premium unrelated to the level of the landowner's investments or costs on top of the rent premium due to scarcity that could be obtained in any event. *See* pp. 5-6, *supra*. Indeed, it is *the homeowner's* investments and potential costs that determine the amount of the premium. The more substantial the homeowner's site-specific investments and additional costs of moving, the greater the home-

owner's exposure to the landowner's ability to extract a rent premium. This additional premium constitutes what is often called a "quasi-rent." [8]

3. Similarly, in the absence of the state and city regulations here, the landowner is in a position to exploit the homeowner's dependent status at the point the homeowner wishes to sell his home. If the homeowner is unable to sell the home as affixed to the landowner's property, but is forced to sell the home off the site, the homeowner would lose the value of all site-specific investments already made and would be required to make additional, otherwise unnecessary, investments:

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[8] The term "quasi-rent" or "appropriable quasi-rent" is often used by economists to refer to the amount of advantage that can be gained by a party acting "opportunistically" after another party makes specialized investments that are specific to the former party's assets. Because the value of the investments in other uses is much less than in the specialized use, the investor is effectively "locked into" the transaction to a significant degree, and the difference in the value of the investments (as between the specialized use and the next best use) may, therefore, be subject to possible appropriation by the other party.

For these reasons, the dominant party in a situation involving quasi-rents may gain a return far in excess of the fair return on his own investments; that party's return will be based instead on his appropriation of the returns that result from the sunk investments of the other party. *See generally*, Klein, Crawford & Alchian, *Vertical Integration, Appropriable Rents, and the Competitive Contracting Process*, 21 J.L. & Econ. 297, 298-302 (1978); Williamson, *Transaction-Cost Economics: The Governance of Contractual Relations*, 22 J.L. & Econ. 233, 234, 240 & n.30 (1979); Muris, *Opportunistic Behavior and the Law of Contracts*, 65 Minn. L. Rev. 521, 521-26 (1981); Goetz & Scott, *Principles of Relational Contracts*, 67 Va. L. Rev. 1089, 1100-1102 & n.25 (1981); Haddock, Macey & McChesney, *Property Rights in Assets and Resistance to Tender Offers*, 73 Va. L. Rev. 701, 712-13 (1987); *see also* Goldberg, *Regulation and Administered Contracts*, 7 Bell J. Econ. 426, 439-41 (1976); Hirsch & Hirsch, *supra*, at 419-20.

Professor Timothy J. Muris cites the situation of a home located on land owned by another as a particularly vivid illustration of the "quasi-rent" problem. *See* Muris, *supra*, at 527 (homeowners with homes located on the property of another risk "landlords . . . increasing the rent up to the cost of moving their homes elsewhere").

(a) The homeowner would lose the value of his investment in transporting the home to the site.

(b) He would lose the value of all adaptations of the home to the site and improvements to the site.

(c) He would have to bear the additional costs of detaching, and, depending on the timing and circumstances of the sale, of transporting the home from the site.

(d) And he would have to pay the costs of repairing any damage to the home from its detachment and transportation from the site.

Absent the enactments here, when the homeowner attempts to sell the mobilehome, the landowner can capture from the homeowner an amount just short of the sum of these losses and costs—the appropriable amount that constitutes the "quasi-rent" in these circumstances, *see* note 8, *supra*—in one or more of the following three ways:

First, the landowner—by refusing to accept all prospective homebuyers as leaseholders—can effectively force the homeowner to sell the home to the landowner at a price just above the amount that results from subtracting the costs and losses incident to an off-site sale from the on-site value of the home. At such a price, the homeowner would be better off selling to the landowner than selling the home off the site. The landowner could then turn around and sell the home to a new buyer at the on-site price and pocket the difference, which would constitute the appropriated "quasi-rent."

Second, the landowner could simply charge the homeowner a sales or transfer fee for any on-site sale. As long as the amount of the fee is less than the sum of the costs and losses listed above—the "quasi-rent"—the homeowner would be better off paying the fee and selling the home on-site than selling the home off-site.

Third, the landowner could agree to accept the prospective buyer, but only at a higher rental rate. The prospective buyer would only be willing to pay the higher rate

if there were a reduction in the sale price of the home sufficient to finance the rental premium. Again, as long as the decrease in the price of the home that is caused by the rent increase is less than the amount of the quasi-rent, the homeowner would be better off accepting the price reduction and selling on-site than selling the home off-site.

Thus, in each of these three ways, the landowner could extract a considerable quasi-rent from the homeowner at the point of sale. And, in each case, the value that the landowner can appropriate does not result from any additional investments by the landowner or any additional good or service that the landowner has provided. To the contrary, the amount extracted is a function of the value the homeowner stands to lose by taking an action that would benefit neither party—removing the home from the site. The more the homeowner has invested in improvements to the home and the site, the more the landowner can extract at the point of sale.

B. The Effects of the California Mobilehome Residency Law on Interests of the Landowner and the Homeowner

In 1978, the State enacted a regulatory scheme directly addressed to, *inter alia*, the potential for exploitation by the landowner of the mobilehome owner's dependent position.

At the outset, the statute clearly recites the state legislature's understanding of the homeowner's vulnerability to such exploitation:

> The Legislature finds and declares that, because of the high cost of moving mobilehomes, the potential for damage resulting therefrom, the requirements relating to the installation of mobilehomes, and the cost of landscaping or lot preparation, it is necessary that the owners of mobilehomes occupied within mobilehome parks be provided with the unique protection from actual or constructive eviction afforded by the provisions of this chapter. [Cal. Civil Code § 798.55(a).]

Based on these considerations, the statute limits the permissible grounds on which a landowner may terminate a mobilehome owner's tenancy, but does so in a manner which fully protects the landowner's legitimate interests in preserving the economic value of his investments and his ultimate control over the use to which his land will be put. Permissible grounds for terminating tenancies thus include: "[f]ailure of the homeowner or resident to comply with a local ordinance or state law or regulation relating to mobilehomes"; "[c]onduct by the homeowner or resident . . . which constitutes a substantial annoyance"; "[f]ailure of the homeowner or resident to comply with a reasonable rule or regulation of the park"; "[n]onpayment of rent, utility charges, or reasonable incidental service charges"; "[c]ondemnation of the park"; and "[c]hange of use of the park or any portion thereof [by the park owner] . . . ." Cal. Civil Code § 798.56 (West Supp. 1991).

Based on the same considerations, the statute limits the landowner's ability to exploit the homeowner's dependent position at the time of the mobilehome's sale. In particular, the statute prohibits two of the three means (discussed at pp. 9-10, *supra*) by which the landowner may extract the appropriable quasi-rent at the time of sale.

First, the statute provides that the landowner "shall not charge a homeowner . . . or the agent of any such person a transfer or selling fee as a condition of a sale of his mobilehome within a park unless the [landowner] performs a service in the sale." Cal. Civil Code § 798.72 (West Supp. 1991).

Second, the statute limits the grounds on which the landowner can refuse to lease the site to a buyer of a home sold on the site by the homeowner. Cal. Civil Code § 798.73. But, once again, the statute does so in a manner that fully protects the landowner's legitimate economic interests in his investments. Thus, the statute permits the landowner, "in order to upgrade the quality of the park,"

to require removal of a mobilehome upon its sale to a third party where the home "is in rundown condition or in disrepair," or where it is older or smaller than certain specifications set forth in the statute. Cal. Civil Code § 798.73. And, the statute, while permitting the landowner to "require the right of prior approval of a purchaser of a mobilehome that will remain in the park," provides that:

> Approval cannot be withheld if the purchaser has the financial ability to pay the rent and charges of the park unless the [landowner] reasonably determines that, based on the purchaser's prior tenancies, he or she will not comply with the rules and regulations of the park. [Cal. Civil Code § 798.74(a) (West Supp. 1991).]

All of these statutory provisions directly further the same policy. By preventing the landowner from unreasonably evicting a homeowner or refusing to approve an appropriate purchase of a home sold in place, and by similarly preventing the landowner from charging an unearned fee upon the sale of a home that will remain on site, these provisions prevent the landowner from using his property to take advantage of the homeowners' vulnerability to the appropriation of *their* investments.

The state statute does not, however, address two remaining means by which a landowner can exploit the homeowner's vulnerable position. First, the statute does not restrict the landowner's ability *on an ongoing basis* to extract rental premiums based on the scarcity of mobilehome sites in a given area and on the appropriable quasi-rents that result from the homeowner's site-specific investments and the costs of removing the home from the site. *See* pp. 7-8, *supra*. Second, the statute does not restrict the landowner's ability to extract the appropriable quasi-rent *at the time of sale* of the home by means of a rent increase to the prospective purchaser. *See* pp. 8-10, *supra*. The statute contemplates that these rent control issues are to be subject to local regulatory judgments. *See* Cal. Civil Code §§ 798.17, 798.45 (West Supp. 1991).[9]

C. The Effects of the City of Escondido Mobilehome Rent Protection Ordinance On the Interests of the Landowner and the Homeowner

In 1988, Escondido adopted a rent control ordinance that addresses the two gaps just discussed in the state-regulatory scheme. The ordinance controls increases in rent, whether imposed on on-going homeowners or on purchasers of homes sold in place.

On the face of the ordinance, careful provision is made to ensure that landowners will be permitted rent increases that provide a fair and reasonable return on the landowners' investments. Thus, the municipal board that is responsible for passing on all rent increase applications is given the following directives:

> The Board shall approve such rent increases as it determines to be just, fair and reasonable. The Board shall consider the following factors, in addition to any other factors it considers relevant, in making such determination:
>
> (1) Changes in the Consumer Price Index for All Urban Consumers in the San Diego Metropolitan Area published by the Bureau of Labor Statistics.
>
> (2) The rent lawfully charged for comparable mobilehome spaces in the City of Escondido.
>
> (3) The length of time since the last hearing and final determination by the Board on a rent

[9] The statute does place certain limits on the authority of local governments to control mobilehome rents: *First*, park owners are exempt from local rent control laws if they and their tenants enter long-term leases containing certain statutorily prescribed provisions. Cal. Civil Code § 798.17. *Second*, in order to promote the development of new mobilehome parks, California mandates that local rent control ordinances exempt all new construction from rent regulation. Cal. Civil Code § 798.45. In the latter regard, California rent control ordinances conform to the pattern of rent control laws in this country. *See* Mandel, *Does Rent Control Hurt Tenants*, 54 Brooklyn L. Rev. 1267, 1268 (1989).

increase application or the last rent increase if no previous rent increase application has been made.

(4) The completion of any capital improvements or rehabilitation work related to the mobilehome space or spaces specified in the rent increase application, and the cost thereof, including such items of cost, including materials, labor, construction interest, permit fees, and other items as the Board deems appropriate.

(5) Changes in property taxes or other taxes related to the subject mobilehome park.

(6) Changes in the rent paid by the applicant for the lease of the land on which the subject mobilehome park is located.

(7) Changes in the utility charges for the subject mobilehome park paid by the applicant and the extent, if any, of reimbursement from the tenants.

(8) Changes in reasonable operating and maintenance expenses.

(9) The need for repairs caused by circumstances other than ordinary wear and tear.

(10) The amount and quality of services provided by the applicant to the affected tenant.

(11) Any existing written lease lawfully entered into between the applicant and the affected tenant. [J.A. 11-12.]

Given the multiplicity of factors that are to be taken into account, it is impossible, based solely on the words of the ordinance, to ascertain with any kind of accuracy the amounts of rent increases that may be permitted to landowners in the future. The factors listed in the ordinance allow the board to monitor and regulate the landowners' efforts to charge rent premiums based on the scarcity of sites or on the extraction of appropriable quasi-rents. But, on its face, the ordinance only "takes" from the landowner the ability to increase rents unilaterally.

Assuming *arguendo* that the ordinance does in fact work to prohibit *entirely* the extraction of such premiums

by the landowner, the homeowner would receive the following benefits: the homeowner would not have to pay rents on an ongoing basis that include premiums for scarcity or quasi-rents; and, at the point of sale of the home, the homeowner would not be subject to extraction of the appropriable quasi-rents by the landowner. Thus, the homeowner would be in a position to realize a return on the full value of all the investments he has made in connection with his home: *viz.*, his investments in the home itself and improvements to the home, in transporting the home and attaching and adapting it to the site, and in improving the site.

These benefits go not only to persons who were homeowners at the time of the ordinance's enactment, but to all successor homeowners. As long as the state and city regulations remain in force, each successor homeowner will be free from rent premiums based on scarcity or the extraction of quasi-rents, and each successive homeowner will be able to invest in his home and his site without fear of being subject to the extraction of quasi-rents if and when he decides to sell his home.

To be sure, petitioners contend that while all successor homeowners may in fact receive such benefits, only the initial homeowners—*viz.*, those who owned mobilehomes at the time the ordinance was enacted—can properly be considered beneficiaries of the ordinance. Petitioners argue that *the full value* of all future benefits of the ordinance will be reflected in the prices paid to the initial homeowners by the first generation of subsequent purchasers, and will continue to be reflected in the purchase prices paid by all successive purchasers. On the basis of this theory, petitioners urge that no successor homeowners derive *any net benefits* from the ordinance. Pet. Br. at 23, 26-27. This theory simply cannot survive analysis.

First, the notion that the initial homeowner would, upon sale of his home, realize the present value of all future benefits of the ordinance—such that all future homeowners would gain no meaningful advantages from the ordinance—rests upon assumptions that have no

grounding in reality. Neither the initial homeowner nor the purchaser of the home would have any realistic ability to calculate the monetary value of the benefits of the ordinance with any degree of accuracy. No one knows what rent increases will be permitted by the board in the short term, much less the long term; no one knows what rent increases would have occurred in the absence of the ordinance; and, certainly, no one is in a position to compute the difference between these two unknown and unknowable amounts.

These uncertainties make it wholly unrealistic to assume that the initial homeowner somehow can deny subsequent purchasers all benefits of the regulations here at issue by charging a premium in the price of the home that will capture the full value of all benefits—just as it would be unrealistic to assume that, in the sale of a private home in the metropolitan Washington, D.C. area, a homeowner can deny all future homeowners any benefit of future increases in that home's value by charging a price that may contain within it some element of expected future appreciation. Benefits that are this speculative and contingent in nature are not susceptible to the kind of neat capture that petitioners hypothesize.[10]

Second, the notion that a subsequent purchaser gains no net benefits from a regulatory scheme because his enjoyment of those benefits may entail paying an increased purchase price is contrary to the most basic premises of our economic system. Presumably, those who make voluntary purchase decisions at market prices believe they are gaining benefits from their purchases. If, as a result of the ordinance, purchasers of a mobilehome are willing to pay more for the home, that is precisely because the purchasers perceive that the benefit they obtain in exchange for the increased price is worth the additional cost.

[10] As Professors Charles Goetz and Robert Scott noted in their study of long-term contracting, "where the future contingencies are peculiarly intricate or uncertain, practical difficulties arise that impede the contracting parties' efforts to allocate optimally all risks at the time of contracting." Goetz & Scott, *supra*, at 1090. *See also id.* at 1090 n.4. *See also* note 11, *infra*.

Here, it is likely that the benefits of the rent-control ordinance will make a mobilehome more attractive to a prospective purchaser, not because he knows that he will achieve a readily identifiable amount of savings, but because the ordinance (together with the state statute) provides him some insurance against certain forms of profteering or exploitation by the landowner. That "insurance benefit" will give the purchaser a measure of security in his investment in the home itself, as well as the knowledge that he can invest what he wishes in improving the home and its site—and, indeed, that he can invest in the broader community as well—free of the fear that such investments will subject him to the opportunistic behavior of a landowner who might treat the homeowner's investments as a means to extract greater profits.

The beneficial effects of the regulations in this regard are particularly significant in that this "insurance benefit"—*viz.*, the protection of homeowners from landowner opportunism and the resulting loss of investments—is not a product that the market produces without these regulations, despite its value to home purchasers. Thus, the regulations must be understood as creating a desired benefit to be used by purchasers as a class.[11]

[11] The failure of the private market to produce this "insurance benefit" is not surprising in light of the practical impediments to any contractual arrangement that would parallel the protections provided by the city and state regulations. The landowner would not rationally bargain away his power to exploit the homeowner's vulnerable position without obtaining the equivalent value in exchange. To make the transaction worthwhile from the homeowner's point of view, the protections would have to extend not only for the duration of his tenancy in the park, but also to at least certain terms of the lease for any purchaser of the home. But, as we have already shown at pp. 15-16 & n.10, *supra*, the uncertainties and contingencies inherent in such a transaction would make it impossible to obtain a reliable valuation of the exchange. In addition to other factors, there are variables within the knowledge and control of the homeowner—for example, the duration of the tenancy and level of future investment—that can significantly affect the value of the transaction from the landowner's perspective. These variables may also create a potential for adverse selection—*viz.* that those seeking contractual

Third, petitioners fail to recognize the broader public purposes that may be achieved by the regulations here.

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protections will be those to whom it will be most costly to grant those protections. Other variables are solely in the knowledge and control of the landowner. Such problems of asymetrical knowledge militate against a mutually agreeable valuation.

Moreover, the transaction would have to take account of a number of costs that the regulations remove from the calculus. For example, both the city and state regulations provide for public mechanisms of enforcement and administration, with built in economies of scale. The costs to an individual homeowner of obtaining comparable mechanisms would be prohibitive. And the price would also have to account for the transaction costs of reaching the agreement itself in the first instance, which in light of the problems already discussed would be considerable.

Scholars who have examined the ability of parties to protect themselves contractually from opportunistic appropriation of quasi-rents in long-term and complex relationships have found that effective contractual protection is rarely—if ever—obtained. *See, e.g.*, Goetz & Scott, *supra*, at 1090 n.4 ("when transactions are conducted under conditions of uncertainty and complexity, it becomes extremely costly —if not literally impossible—for parties . . . to describe the complete decision tree at the time of bargaining"); Klein, Crawford & Alchian, *supra*, at 303 ("[e]xplicit long-term contracts can, in principle, solve opportunistic problems, but . . . they are often very costly solutions"); Muris, *supra*, at 527-28 ("[f]ully explicit contracts . . . are not feasible when the cost of discovering and planning for all possible contingencies is prohibitive").

Moreover, even if complex contractual solutions to the problems of quasi-rents and opportunistic behavior were obtainable, many scholars view the efforts to obtain them as socially wasteful. Even if all issues of distributive justice were put aside, the fact remains that expenditures to capture quasi-rents generate no new product or service; nor do expenditures to gain contractual protection from the party who might capture quasi-rents. *See* Muris, *supra*, 524 ("Resources spent to implement or prevent opportunistic behavior do not help produce a commodity or service that the contracting parties mutually value. Accordingly, the elimination or reduction of these expenditures will improve the wealth of society by freeing the resources for productive use."). Thus, a number of commentators have argued that social welfare is often promoted by systems of regulation that prevent opportunism. *See id.* at 576-77 (noting benefits of various regulations which deter appropriation of quasi-rents); Williamson, *supra*, at 257-58 (same); *see also* Goldberg, *supra*, at 439-41.

The combined effect of the state and city enactments may well be to create an economic environment for mobilehome housing that encourages homeowners freely to invest in improving their homes, their lots, and their communities. By assuring homeowners that they will retain the value of their investments, the regulations give homeowners the incentive to make such investments, and generally to commit themselves to community improvements. Without these regulations homeowners might well refrain from such investments, or, alternatively, those placing a high value on such investments might well refrain from purchasing mobilehomes. Either way, mobilehome communities would be less stable and less attractive, and would thus make less of a contribution to the greater community's well being. The beneficiaries of these regulations thus clearly include all mobilehome residents, as well as the broader community, which has every interest in promoting socially productive investments by assuring that those who make such investments reap appropriate rewards.[13]

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[12] To the extent that an initial homeowner may obtain a unique benefit, it is important to be clear about what that benefit would be. Prior to the adoption of the regulations here, the ability of the landowner to extract quasi-rents at the time of sale would likely have resulted in a depression of the price of mobilehomes. In so far as that result occurred, it should follow that government restrictions on the landowner's ability to extract quasi-rents would tend to remove that depression in price. Accordingly, it may be that the initial howeowner was able to purchase the home at a depressed price and will be able to sell the home at a price that is not depressed.

But it may also be true that the class of initial homeowners has suffered a unique detriment. Of all present and future homeowners at the time the ordinance was enacted, by definition only the initial homeowners had leased sites under a regime where the landowners were free to extract rent premiums based on scarcity or quasi-rents. For the reasons stated in text, pp. 15-19, *supra*, all successor homeowners will have the protections that the ordinance provides against such premiums. If the initial homeowners receive an increase in the price of homes that somehow reflects the difference between leasing with the protections of the regulations as opposed to leasing without the protections of the regulations, that increase would be going to

II. THE ORDINANCE DOES NOT EFFECT A "TAKING" UNDER THE CONSTITUTION

As we have just demonstrated, all that the city rent control ordinance may be said to "take" from petitioners is the ability to obtain rent premiums in excess of a fair and reasonable rent. Indeed, the essence of petitioners' complaint is that the ordinance denies them the rent increases that would obtain in a market in which they could gain full advantage from scarcity and their market leverage. As we now demonstrate, this Court's decisions have repeatedly upheld as constitutional regulatory schemes that deny to property owners precisely such advantages.

It is well established that the Constitution does not protect the right of property owners to set prices or reap profits at the levels that could be achieved in some hypothetical market that is free of government regulation. To the contrary, we live in a society in which government is intimately involved in myriad aspects of our economic life, and thus where no market is entirely free of government regulation. Virtually all government regulation, in any form, has some direct or indirect effect on the value of private property or on the income to be derived from private property. Such government actions as the establishment of Federal Reserve Board policies, changes in trade policy, adoption of environmental or occupational safety and health restrictions, placement of roads and highway, or enforcement of the anti-trust laws all may have drastic effects on the value of any given parcel of private property.

Diminutions in the value of private property caused by government actions of this kind are simply part of the fluctuations in the value of property that occur in an economy in which market conditions are subject to myriad influences beyond the control of individual property owners. In a nation where "the function of

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the only class of howeowners that has had to pay the price of leasing without the regulations' protections.

government may often be to tamper with free markets, correcting their failures and aiding their victims," *Fisher v. City of Berkeley*, 475 U.S. 260, 264 (1986), no owner of property can be unaware that some regulatory action by government may affect the value of the owner's property. "Such changes in value are incidents of ownership. They cannot be considered as a 'taking' in the constitutional sense." *Danforth v. United States*, 308 U.S. 271, 285 (1939).

Thus, a seller or a landowner has no vested property interest in a level of profit based upon the price or the rent that would emerge in some hypothetical market free of regulation. The government has the constitutional authority, in pursuit of legitimate purposes, to reject the results produced by a "free market" and substitute a regulated result that balances the interests of the affected private parties in a different fashion. Whether the change in the value of property is caused by such government regulation of price or by the actions of private parties that affect the property's market value, one risk of property ownership in our society is, and always has been, that the property's value may change.

This Court has on a number of occasions applied these principles in the context of holding constitutional government price-control or rent-control regulations. Indeed, the Court has emphasized that such price and rent regulations have been with us for centuries:

> It is plain that the Constitution does not forbid the imposition, in appropriate circumstances, of maximum prices upon commercial and other activities. A legislative power to create price ceilings has, in "countries where the common law prevails," been "customary from time immemorial . . . ." *Munn v. Illinois*, 94 U.S. 113, 133. [*Permian Basin Area Rate Cases*, 390 U.S. 747, 769 (1968).]

And, as Justice Jackson explained in his separate opinion in *Federal Power Comm'n v. Hope Gas Co.*, 320 U.S. 591 (1944), the power to legislate price ceilings is necessarily the power to deprive the seller of the value he

could obtain in a market in which he enjoyed advantages based on scarcity or market power:

> [T]here is nothing in the law which compels a commission to fix a price at that "value" which a company might give to its product by *taking advantage of scarcity, or monopoly of supply.* The very purpose of fixing maximum prices is to take away from the seller his opportunity to get all that otherwise the market would award him for his goods. This is a constitutional use of the power to fix maximum prices[.] [320 U.S. at 655 (emphasis added).]

This Court, in *Pennell v. San Jose*, 485 U.S. 1 (1988), recently made precisely the same point with specific application to residential rent control:

> [W]e have recognized that the government may intervene in the marketplace to regulate rates or prices that are artificially inflated as a result of the existence of a monopoly or near monopoly, or a discrepancy between supply and demand in the market for a certain product. Accordingly, appellants do not dispute that the [rent control] Ordinance's asserted purpose of "prevent[ing] excessive and unreasonable rent increases" caused by the "growing shortage of and increasing demand for housing in the City of San Jose . . ." is a legitimate exercise of appellees' police powers. *Cf. Block v. Hirsh*, 256 U.S. 135, 156 (1921) (approving rent control in Washington, D.C., on the basis of Congress' finding that housing in the city was "monopolized"). [485 U.S. at 11 (internal citations omitted).]

This Court has also stated the standard for determining when a price or rent control is so severe that the control constitutes an unconstitutional taking, and this standard is not geared to a property owner's ability to benefit from whatever scarcity or market power may have existed prior to the controls. In *FCC v. Florida Power Corp.*, 480 U.S. 245 (1987), for example, the FCC reduced the property owner's negotiated rental rates by 75%, and this Court ruled that even that drastic reduction did not constitute a taking:

> It is of course settled beyond dispute that regulation of rates chargeable from the employment of private property devoted to public uses is constitutionally permissible. Such regulation of maximum rates or prices may, consistently with the Constitution, limit stringently the return recovered on investment, for investors' interests provide only one of the variables in the constitutional calculus of reasonableness. So long as the rates set are not confiscatory, the Fifth Amendment does not bar their imposition. * * * * Appellees have not contended, nor could it seriously be argued, that a rate providing for the recovery of fully allocated cost, including the actual cost of capital, is confiscatory. Accordingly, we hold that the FCC regulatory order challenged below does not effect a taking of property under the Fifth Amendment. [*Id.* at 253, 254 (internal citations and quotation marks omitted).][13]

The ordinance here on its face provides for the approval of rent increases that are "just, fair and reasonable," and its terms focus specific attention on the landowner's costs and investments. J.A. 11, 12. There is simply no basis for a conclusion that the rate increases allowed by the ordinance are or will be "confiscatory."

While the foregoing authorities are, we submit, sufficient to dispose of the issue fairly raised by the ordinance challenged here, petitioners have sought to avoid the force of those authorities by recasting the issue in various ways. As we now show, each of the petitioners' efforts to recast the case fails at the threshold, because each is based on an inaccurate characterization of the ordinance or its effects.

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[13] This Court held many years ago that rental housing is within the category of "property devoted to public uses" as that phrase is used in the passage quoted in text. "Housing is a necessary of life. All the elements of a public interest justifying some degree of public control are present." *Block v. Hirsh*, 256 U.S. 135, 156 (1921). That conclusion has been recently reaffirmed. *See Pennell, supra*, 485 U.S. at 12; *see also Reitman v. Mulkey*, 387 U.S. 369, 385-86 (1967) (Douglas, J., concurring).

1. Petitioners contend that the challenged ordinance "takes from [the] landowner the right of possession and confers that right upon another," thereby effecting a "permanent physical occupation" of the landowner's property. Pet. Br. at 9. By so characterizing the effect of the ordinance, petitioners seek to fit within the holding of *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982), in which the Court found a taking where a statute compelled a landlord to permit the cables and equipment of a cable company to occupy permanently a part of her apartment building.

The *Loretto* Court, however, was careful to circumscribe the scope of its holding. The Court emphasized that the case did *not* involve the respective rights of landlords and tenants, *id.* at 439, and stressed that governments retain broad discretion in reordering the landlord-tenant relationship:

> This Court has consistently affirmed that States have broad power to regulate housing conditions in general and the landlord-tenant relationship in particular without paying compensation for all economic injuries that such regulation entails. [*Id.* at 440 (citing *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241 (1964) (discrimination in places of public accommodation); *Queenside Hills Realty Co. v. Saxl*, 328 U.S. 80 (1946) (fire regulation); *Bowles v. Willingham*, 321 U.S. 503 (1944) (rent control); *Home Building & Loan Assn. v. Blaisdell*, 290 U.S. 398 (1934) (mortgage moratorium); *Edgar A. Levy Leasing Co. v. Siegel*, 258 U.S. 242 (1922) (emergency housing law); *Block v. Hirsh*, 256 U.S. 135 (1921) (rent control)).]

The Court then concluded its opinion by declaring:

> Our holding today is very narrow. We affirm the traditional rule that a permanent physical occupation of property is a taking. In such a case, the property owner entertains a historically rooted expectation of compensation, and the character of the invasion is qualitatively more intrusive than perhaps any other category of property regulation. We do not, however, question the equally substantial authority upholding a State's broad power to impose appropriate restrictions upon an owner's *use* of his property. [458 U.S. at 441 (emphasis in original).]

For each of the following reasons, petitioners' efforts to transform this case into a case governed by *Loretto* must fail.

First, as we stated at the outset of this brief, p. 2, *supra*, the complaint here challenges only the city ordinance, and not the state statute. The City is the only defendant, and no claim can be asserted against the City that the state statute is invalid. Yet petitioners' assertions that their rights of physical occupation have been taken go only to those provisions *of the state statute* relating to the landowner's right to evict tenants or to refuse to accept qualified prospective tenants. If petitioners were completely successful in this case, these *state restrictions* would remain in force.

The question here then is only whether the City's rent control provisions effect a "permanent physical occupation" of the landowner's property. Insofar as the ordinance applies to petitioners, it governs only the amount of allowable rents.[14] The ordinance then, for all purposes here, is simply a garden variety rent control regulation. As we have noted, *Loretto* explicitly states that such rent regulations are not physical takings, but rather are enactments that "states have broad power to [adopt] without paying compensation for all economic injuries that such regulation entails." 458 U.S. at 440.

Second, the state statute, even if it were properly before the Court, does not effect any physical taking. Petitioners are voluntarily in the business of running a mobilehome park. The very essence of that business is

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[14] Section 6 of the ordinance adopts provisions parallel to the state law provisions but is applicable only to "[a] tenancy which is not subject to the provisions of the Mobilehome Residency Law." J.A. 13. Petitioners do not contend that their challenges involve any such tenancies.

to invite mobilehome owners to place their homes on sites in the park. Indeed, no site in petitioner's park can become occupied except by petitioners' invitation. Petitioners' land is thus occupied by homes *not* because of state compulsion, but because of petitioners' commercial choices.

Moreover, the statute does not prevent petitioners from going out of the mobilehome park business, in whole or in part, and, thus, having the homes removed from petitioners' land. Subject only to notice requirements and local zoning requirements (neither of which are challenged), the statute expressly envisons that a landowner may "[c]hange [the] use of the park or any portion thereof . . . ." Cal. Civil Code § 798.56(g) (West Supp. 1991). What the state statute does regulate therefore is not whether the land will be occupied by mobilehomes, but whether the landowner will have the ability, while he chooses to remain in the mobilehome park business, to retain full control over the identity of his mobilehome lessees.[15]

All that petitioners here are faced with is a requirement that, while offering their property to the public for commercial advantage, they must do so without excluding tenants who give them no commercially valid reasons for such exclusion. In this respect, the state statute is wholly analogous to the regulation at issue in *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241 (1964), where this Court rejected, *inter alia*, a challenge under the Takings Clause to Title II of the Civil Rights Act of 1964, which banned racial discrimination by those offering

[15] For this reason, petitioners' citation of *FCC v. Florida Power Co.*, 480 U.S. 245 (1987), does not assist their cause. In *Florida Power Co.*, the Court held that the government may regulate the terms of the physical use of property once the landowner consents to that use. The Court reserved the question whether a physical taking would occur if the landowner were required to continue a use of his property to which he no longer consented. *See id.* at 251-52 n.6. No such question is presented here, because petitioners continue to voluntarily offer their property to the public for use as a mobilehome park.

public accommodations. The Court declared that "[the motel owner] has no 'right' to select its guests as it sees fit, free from governmental regulation." *Id.* at 259, 261. *See also, PruneYard Shopping Ctr. v. Robins*, 447 U.S. 74, 82-84 (1980). The federal government, the States, and a multitude of local governments have adopted a variety of regulations of property owners who are in the business of offering their property for public occupation, severely limiting the ability of those owners to select who may accept their offers. *See, e.g.*, Fair Housing Act, 42 U.S.C. §§ 3601-3631, California Fair Employment and Housing Act, Cal. Gov't Code §§ 12900-12996, Cal. Unruh Civil Rights Act, Cal. Civ. Code § 51. And, the state regulations here are of the same character.

Regulations of this nature have roots as old as the common law's "common carriage" requirements and are integral to much of our established regime of regulated industries. *See, e.g., Illinois Natural Gas Co. v. Central Illinois Pub. Serv. Co.*, 314 U.S. 498, 507-08 (1942) (order that a natural gas pipeline company "establish physical connections of their transportation facilities with [specific] distributors, and . . . sell gas to them"); *United States v. Terminal Railroad Ass'n*, 224 U.S. 383, 411-12 (1912) (order to owners of railroad terminal facilities to "provide definitely for the use of the terminal facilities by any other railroad . . . upon such just and reasonable terms and regulations as will, in respect of use, character, and cost of service, place every such company upon as nearly an equal plane as may be with respect to expenses and charges as that occupied by the proprietary companies.") The California statute's restrictions on landowner discrimination is no more a taking than are the kinds of "common carriage" anti-discrimination rules enforced in *Illinois Natural Gas* or *Terminal Railroad Association*. Holding such rules to be takings would throw into question a vast portion of our regulatory regimes. *Loretto* gave no indication it intended such a result.

2. Petitioners next argue, apparently as an alternative to the physical taking argument, that the Escondido ordinance effects such "an oppressive deprivation of property rights" (Pet. Br. at 17) as to constitute a regulatory taking under the standards articulated in *Penn Central Transp. Co. v. New York City*, 438 U.S. 104 (1978). In support of that argument, petitioners ascribe consequences to the ordinance that bear no relation to what the ordinance in fact requires—*e.g.*, that the ordinance's limitations on unilateral rent increases somehow "abridge" petitioners' "right to exclude others" from their property *id.* at 18), and that the ordinance somehow freezes the amounts that petitioners may charge as rent so that "[p]etitioners [will] receive controlled rents which decline in constant dollars of inflation" (*id.* at 20). When the effects of the ordinance are stated accurately, there can be no serious contention that the ordinance constitutes a regulatory taking under *Penn Central.*

As we have shown, the ordinance on its face simply establishes an administrative process through which park owners will receive rent increases that are "just, fair and reasonable" in light, *inter alia*, of the park owners' costs and investments. *See* pp. 13-14, *supra.* And, as we have also shown, this Court has repeatedly approved this form of regulation against constitutional challenge. *See* pp. 20-23, *supra. Penn Central* in no way altered the law in this regard. Indeed, *Penn Central* reiterated the vitality of numerous prior decisions in which "this Court has upheld . . . regulations that destroyed or adversely affected recognized real property interests." *Id.* at 125.

Although petitioners claim that the ordinance here "interferes with [their] reasonable investment-backed expectations" (Pet. Br. at 22), the ordinance's impact pales beside the economic injuries and diminished economic expectations this Court has found in other cases not to constitute regulatory takings.[16] The most that petitioners

[16] *See, e.g., Connolly v. Pension Benefit Guarantee Corp.*, 475 U.S. 211, 225 (1986) (retroactive imposition on employers of liability for substantial unfunded vested pension benefits is not a taking although "there is no doubt that the Act completely deprives an employer of whatever amount of money it is obligated to pay to fulfill its statutory liability"); *Usery v. Turner Elkhorn Mining Corp.*, 428 U.S. 1 (1976) (retroactive imposition on employers of liability for compensation to employees for previously incurred disabilities is not a taking although employers had never contracted for such liability); *Hadacheck v. Sebastian*, 239 U.S. 394, 405 (1915) (reducing value of property from $800,000 to $60,000 is not a taking).

may lose is the opportunity to extract premiums—in excess of a fair and reasonable return—based on scarcity or on exploitation of quasi-rents. *See* pp. 6-19, *supra.* As we have shown, this Court's price and rent control cases reject the notion that the loss of the opportunity to exercise such forms of market leverage is a compensable loss under the Takings Clause. *See* pp. 20-23, *supra.*

3. Petitioners also contend that under *Nollan v. California Coastal Comm'n*, 483 U.S. 825, 834 n.3 (1987), the Escondido ordinance constitutes an unconstitutional taking, because the deprivation that park owners have suffered "does not substantially advance legitimate state interests." Pet. Br. at 25 (emphasis deleted). The predicate for this contention is the assertion that the ordinance has no effect other than to transfer from the landowner to those who were homeowners at the time the ordinance was adopted the right to collect the value of the rent premiums that are at issue here. *Id.* at 26-29. But we have demonstrated in great detail that the ordinance benefits not only the homeowner at the time the ordinance was adopted but all successor purchasers, as well as the greater community. *See* pp. 15-19, *supra.*

The fit between the means and the ends here could not be closer. The means are the control of the landowners' ability to charge rent premiums based on scarcity and the extraction of quasi-rents. The ends are the benefits that accrue directly from mobilehome owners being given a measure of protection against having to pay such premiums: (1) to limit periodic rent increases to amounts that provide a fair and reasonable return based on the in-

vestments of the park owner and not on the latter's market leverage; (2) to protect against the park owner's ability to extract quasi-rents from the homeowner at the time of sale by raising the rent to the purchaser and thereby depressing the sale price of the home; and (3) to give economic incentives to mobilehome owners to invest in improving their homes, their sites, and their communities. *See* pp. 6-19, *supra*.

Petitioners may disagree with the economic analysis or the policy choices that underlie the City's approach. But the language in *Nollan*, 483 U.S. at 834 n.3, that "the regulation [should] 'substantially advance' the 'legitimate state interest' sought to be achieved" (citation omitted) should not be understood as an invitation to judicial second-guessing of the wisdom of choices made by the democratic institutions of our society. Otherwise, the Takings Clause would become the vehicle for a revival of *Lochner v. New York*, 198 U.S. 45 (1905), and federal courts would again sit in judgment on the wisdom of all economic regulation.

What this Court said in *Nebbia v. New York*, 291 U.S. 502, 537-38 (1934), in the context of the Due Process Clause, is equally applicable in the context of the Takings Clause:

> With the wisdom of the policy adopted, with the adequacy or practicability of the law enacted to forward it, the courts are both incompetent and unauthorized to deal. The course of decision in this court exhibits a firm adherence to these principles. Times without number we have said that the legislature is primarily the judge of the necessity of such an enactment, that every possible presumption is in favor of its validity, and that though the court may hold views inconsistent with the wisdom of the law, it may not be annulled unless palpably in excess of legislative power.

CONCLUSION

For the foregoing reasons, the judgment of the court below should be affirmed.

Respectfully submitted,

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